Supreme Court of the United States.

No. 162.—October Term, 1903.

Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, Petitioners,
vs.
The Mexican National Railroad Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 11, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action brought in the United States Circuit Court for the Northern District of Texas by citizens and residents of Texas against a Colorado corporation operating a railroad from Texas to the City of Mexico. The plaintiffs are the widow and children of William H. Slater, who was employed by the defendant as a switchman on its road and was killed through the defendant's negligence while coupling two freight cars at Nueva Laredo, in Mexico. This action is to recover damages for the death. The laws of Mexico were set forth in the plaintiff's petition, and the defendant demurred on the ground that the cause of action given by the Mexican laws was not transitory, for reasons sufficiently stated. The demurrer was overruled, and the defendant excepted. A similar objection was taken also by plea setting forth additional sections of the Mexican statutes. A demurrer to this plea was sustained, subject to exception. The same point was raised again at the trial by a request to direct a verdict for the defendant. The judge who tried the case instructed the jury that the damages to be recovered, if any, were to be measured by the money value of the life of the deceased to the widow and children, and the jury returned a verdict for a lump sum, apportioned to the several plaintiffs. The judge and jury in this regard acted as prescribed by the Texas R. S. Art. 3027. The case then was taken to the Circuit Court of Appeals, where the judgment was reversed and the action ordered to be dismissed. 115 Fed. R. 593; 53 C. C. A. 239.

There is no need to encumber the reports with all the statutes in the record. The main reliance of the plaintiffs is upon the following agreed translation from the Penal Code, Book 2, "Civil Liability in Criminal Matters." "Art. 301. The civil liability arising from an act or omission

contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, a proximate and inevitable consequence." Coupled with these are articles making railroad companies answerable for the negligence of their servants within the scope of the servants' employment. Penal Code Bk. 2, Arts. 330, 331; Regulations for the Construction, Maintenance and Operation of Railroads, Art. 184. We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime within the definition of Article 11 of the Penal Code, and, therefore, if the above sections were the only law bearing on the matter, that they created a civil liability to make reparation to any one whose rights were infringed.

As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart* v. *Baltimore & Ohio R. R.*, 168 U. S. 445. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout* v. *Wood*, 1 Blackf. Ind. 71; *Dennick* v. *Central R. R. Co. of New Jersey*, 103 U. S. 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In *Northern Pacific R. R.* v. *Babcock*, 154 U. S. 190, 199, an action was brought in the District of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far

as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. See further *Pullman Palace Car Co.* v. *Lawrence*, 74 Miss. 782, 801, 802, *et seq.*; *Morris* v. *Chicago, Rock Island & Pacific Ry.*, 65 Iowa, 727, 731; *Mexican National Ry.* v. *Jackson*, 89 Tex. 107; *Bruce* v. *Cincinnati R. R.*, 83 Ky. 174, 181; *Holmes* v. *Barclay*, 4 La. An. 64; *Atwood* v. *Walker*, 179 Mass. 514, 519; Minor, Conflict of Laws, 493, § 200. We are aware that expressions of a different tendency may be found in some English cases. But they do not cover the question before this Court, and our opinion is based upon the express adjudication of this Court and as it seems to us upon the only theory by which actions fairly can be allowed to be maintained for foreign torts. As the cause of action relied upon is one which is supposed to have arisen in Mexico under Mexican laws, the place of the death and the domicil of the parties have no bearing upon the case.

The application of these considerations now is to be shown. The general ground on which the plaintiffs bring their suit is, as we have stated, that there is a civil liability imposed on the railroad company arising from an act contrary to the penal law—a negligent crime, as it is called in the code. But the code contains specific provisions for the case of homicide. These necessarily override the merely general rule for torts which also are crimes. *Mutual Life Ins. Co. of New York* v. *Hill*, U.S. . By Art. 311 the right is personal to the parties mentioned in Art. 318, and is no part of the estate of the deceased. The specific cause of action is the killing of the deceased. So far as appears, apart from that and the following articles, these plaintiffs would have no right of action for the cause alleged. For Art. 304 seems to presuppose a right in the family, not to create one, and we cannot assume a general right of the members of a family to sue for causing death. By Article 318 civil responsibility for a wrongful homicide includes, besides the expenses of medical attendance and burial and damages to the property of the deceased, the expenses "of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave." Then, by Art. 319, the obligation to support shall last during the time that the deceased might have lived, calculated by a given life table, but taking the state of his health before the homicide into consideration, but "the obligation shall cease: 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support." It is unnecessary to

set forth the detailed provisions as to support in other parts of the statutes. It is sufficiently obvious from what has been quoted that the decree contemplated by the Mexican law is a decree analogous to a decree for alimony in divorce proceedings—a decree which contemplates periodical payments and which is subject to modification from time to time as the circumstances change. See, also, Arts. 1376, 1377, of the Code of Procedure, and Penal Code, Bk. 2, Art. 363.

The present action is a suit at common law and the Court has no power to make a decree of this kind contemplated by the Mexican statutes. What the Circuit Court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong and was excepted to specifically. But we are of opinion further that justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statute required. The marriage of beneficiaries, the cessation of the absolute necessity for the payments, the arising of other circumstances in which, according to law, the deceased would not have been required to continue the support, all are contingencies the chance of which cannot be estimated by any table of probabilities. It would be going far to give a lump sum in place of an annuity for life, the probable value of which could be fixed by averages based on statistics. But to reduce a liability conditioned as this was to a lump sum would be to leave the whole matter to a mere guess. We may add that by Art. 225, concerning alimony, the right cannot be renounced, nor can it be subject to compromise between the parties. There seems to be no possibility in Mexico of capitalizing the liability. Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas State courts. *Mexican National Ry.* v. *Jackson*, 89 Tex. 107; *St. Louis, Iron Mountain & Southern Ry.* v. *McCormick*, 7 Tex. 660. The case is not one demanding extreme measures like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico, on the other side of the river, and it is to be presumed that the courts there are open to the plaintiff, if the statute conferred a right upon them notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case. See *Mulhall* v. *Fallon*, 176 Mass. 266.

So far as appears, the civil liability depends upon penal liability; no different suggestion has been made; and thus far we have taken it for granted that the defendant was within the penal law. The Circuit Court made the same assumption, although the question was one of fact, in case the jury should find the negligence relied upon to be proved. But whether or not a railroad company was subject to penalty for a homicide caused by

the negligence of its servants did not appear. It has occurred to us, although no such argument was made, that it might be sought to sustain the liability on a different ground. The alleged cause of the accident was the different height of the draw-heads on two cars which the deceased attempted to couple as they came together. By Art. 52 of the Mexican Railroad Regulations it is required that "the cars which enter into the make up of a train shall have draw-heads of the same height." By Art. 208 of the same "all violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals through indemnity and the liabilities which the companies may incur through criminal acts and omissions committed by them." It might be argued that these sections, coupled with Articles 301 and 304 of the Penal Code, to which we referred in the beginning, were enough to create the liability without regard to the question of homicide. To this it might be enough to answer that it does not appear that a law imposing a fine to be assessed by the department of public works is a penal law within the meaning of the code—that, as we have said in a different connection, when the tort relied on is a homicide the specific provisions for homicide override merely general rules, and that the plaintiffs come here relying, as they have to rely, upon a statute which gives them a right of action independent of the deceased, and that the statute is made expressly and only for the case of homicide. Penal Code, Bk. 2, Art. 311.

But what we last have said brings into consideration another error of the Circuit Court which hitherto we have not mentioned. The defendant offered the deposition of a Mexican lawyer as to the Mexican law. This was rejected, subject to exception, seemingly on the ground that the agreed translation of the statutes was the best evidence. So no doubt they were, so far as they went, but the testimony of an expert as to the accepted or proper construction of them is admissible upon any matter open to reasonable doubt. Many doubts are left unresolved by the documents before us. The expert would have testified that where no criminal proceedings had been had, the right of the widow and children was dependent upon the Court's finding that the killing was a crime as defined by the penal code, and that the right was in the nature of alimony or pension to be paid in installments for periods of time fixed by the court. Without stating his testimony more fully, we have said enough to show that it should have been received. Seemingly he understood that he was testifying in a case against a railroad, and if so he furnished further reasons for denying any liability except on the footing of homicide. In a case of homicide he excluded the argument that there was a right to a lump sum under Arts.

301, 304, distinct from the right to alimony, and he confirmed the conclusion drawn from the language of the code as to what would be the nature of a Mexican decree in such a case. There may be other matters which would have to be considered before the verdict could be sustained, but what we have said seems to us sufficient to show that the judgment of the Circuit Court of Appeals should be affirmed.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

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[April 11, 1904.]

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice Peckham, dissenting:

Slater, the deceased, was a citizen of Texas, residing at Laredo in that State. The Mexican National Railroad Company was a corporation of Colorado, owning and operating a railroad from Laredo to the City of Mexico. Its superintendent resided in Laredo. Slater was fatally injured through the negligence of the company while working in its yard in New Laredo, just across the Rio Grande in Mexico, and died in Laredo from the injuries so inflicted. His wife and children, who resided in Laredo, brought this suit in the Circuit Court of the United States, diverse citizenship being the ground of jurisdiction, and no objection in that regard arises. Defendant did not "happen to be caught" in Laredo, but was domiciled there.

The laws of Texas provided that an action for damages on account of injuries causing death may be brought when the death is caused by the wrongful act, negligence, unskillfulness or default of another, and without regard to any criminal proceedings in relation to the homicide. The jury are to give such damages as they may think proportioned to the injury resulting from the death, to be divided among the persons entitled in such shares as found by the verdict. The jury pursued that course in this case under the instructions of the Circuit Court.

By the laws of Mexico, damages are recoverable for death by wrongful act, but they, it is said, are awarded as support by decree in the nature of alimony or pension.

As the two countries concur in holding that the act complained of is the subject of legal redress, the question is whether recovery in this cause must be defeated because the law of Mexico controls and cannot be enforced in Texas.

It seems to me that the method of arriving at and distributing the damages pertains to procedure or remedy, that is to say, to the course of the court after parties are brought in, and the means of redressing the wrong, and I think the general rule that procedure and remedy are regu-

lated by the law of the forum is applicable. 2 Rawle's Bouvier, 870; *Kring* v. *Missouri*, 107 U. S. 231; *Stewart* v. *Baltimore & Ohio Railroad Company*, 168 U. S. 445.

In *Northern Pacific Railroad Company* v. *Babcock*, 154 U. S. 190, 199, the company was not a corporation of Minnesota, and the ruling simply was that the right to recover was governed by the *lex loci*. The amount found was within the law of Minnesota as well as that of Montana.

The extent of damages does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted. Finch, J., *Wooden* v. *Railroad Company*, 126 N. Y. 10.

In *Scott* v. *Lord Seymour*, 1 H. & C. 217, which was an action by one British subject against another for an assault committed in a foreign country, it was held unanimously by the Courts of Exchequer and of the Exchequer Chamber that the objection that by the foreign law compensation in damages could not be recovered until certain penal proceedings had been commenced and determined there, was an objection to procedure merely, and not a bar to the action in England. And many of the judges were of opinion that an action was maintainable for any act which would have been a tort if done in England, and, whether actionable or not, was unjustifiable or wrongful, in a broad sense, under the law of the foreign country where the act was done.

Mr. Justice Wightman, (Willes, J., in effect concurring,) specifically held that if an action would lie by the English law for a particular wrong, the English courts would give redress for it, though it was committed in a country by the laws of which no redress would be granted, if the parties were both British subjects.

This case has never been overruled, and is cited as authority by Mr. Pollock in his work on Torts, 6th ed. p. 201.

At all events, the rule in England is well settled, as thus laid down in *Machado* v. *Fontes*, (1897) 2 Q. B. Div. 231: "An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful both in this country and in the country where it was committed; but it is not necessary that the act should be the subject of civil proceedings in the foreign country." *Phillips* v. *Eyre*, (1870) L. R. 6 Q. B. 1, and *The M. Moxham*, (1876) 1 P. D. 107, were there cited and applied.

In *Phillips* v. *Eyre*, Willes, J., delivering the opinion of the Exchequer Chamber, said: "As a general rule, in order to found a suit in England, for a wrong committed abroad, two conditions must be presented, first, the wrong must be of such a character as to be actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

In *The Halley*, L. R. 2 P. C. 202, Lord Justice Selwyn, speaking for the court, said: "It is true that in many cases the courts of England inquire

into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordships' opinion, alike contrary to principle and to authority, to hold, that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

The rule in this court goes further, for "by our law, a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the State where the suit is brought." *Huntington* v. *Attrill*, 146 U. S. 670.

It is enough that the act complained of here was wrongful by both the law of Texas and the law of Mexico, and in such a case the action lies in Texas, except where the cause of action is not transitory, but is purely local such as trespass to land. *Dennick* v. *Railroad Company*, 103 U. S. 11; *Railway Co.* v. *Cox*, 145 U. S. 604; *Ellenwood* v. *Marietta Chair Company*, 158 U. S. 105; *Mitchell* v. *Harmony*, 13 How. 115; *McKenna* v. *Fisk*, 1 How. 271.

It is suggested that the Texas courts have held that there can be no recovery in Texas because of the dissimilarity in the ascertainment of damages between the law of Texas and that of Mexico. And this seems to have been so ruled in *Mexican National Railway* v. *Jackson*, 89 Tex. 107, but the question is one of general law, and we are not bound by that ruling. Moreover, the railway company is stated in that case to have been "a Mexican corporation whose line of railway extended into Texas," whereas in this case the company is a corporation of Colorado, domiciled in Texas, and whose line of railway extends from Texas into Mexico. Again, after that decision was rendered, in *Mexican Central Railway Company* v. *Mitten*, 13 Tex. Civil App. 603, the company being a Massachusetts corporation and Mitten a citizen of Texas, the Court of Civil Appeals for the Fourth District of Texas held to the contrary.

The court said: "If the construction placed upon the decision in the Jackson case be the true one, and some of its expressions would seem to justify the construction, it is a practical denial of remedies for wrongs that may be inflicted by one of our citizens upon another in Mexico, . . ." and: "We are not willing to subscribe to such doctrine and will not extend the scope of the decision referred to beyond the purview of the facts of that case."

The Supreme Court of Texas apparently accepted this view for it refused to grant a writ of error to review the judgment. 13 Tex. Civ. App. v. And see *Evey* v. *Mexican Central Railway Company*, 81 Fed. Rep. 294.

I entirely agree with the views expressed in *Scott* v. *Seymour*, to which I have referred. The legal relations of Slater with the United States and Texas were not destroyed by his crossing the Rio Grande to work in the railroad yard. This Colorado corporation was domiciled in Texas, as Slater was. The laws of Texas protected them alike. The injury was inflicted in Mexico and resulted fatally in Texas. The wrongful act was actionable in Texas and in Mexico.

The jurisdiction of the Circuit Court over person and subject matter was unquestionable, and I cannot accept the conclusion that the form in which the law of Mexico provides for reparation to its own citizens constitutes a bar to recovery in Texas in litigation between citizens of this country.

My brothers HARLAN and PECKHAM concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.